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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 110

AMERICAN STATES INSURANCE COMPANY, - - - - - - - - - **Petitioner,**

versus

CRANE SUPPLY COMPANY, a Division of Crane Company, - - - - - **Respondent.**

BRIEF FOR RESPONDENT.

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SUMMARY OF ARGUMENT.

The petition fails to present any grounds for review of the judgment of the Court of Appeals.

The appeal was taken on the grounds that the District Court erred in overruling the petitioner's motion for a judgment notwithstanding the verdict of the jury. There were no other claimed errors.

On appeal (Reply Brief, p. 7), the petitioner stated that the only disputed question of fact was whether the respondent accepted certain notes in payment of the contractor's account. The jury found that the notes were not accepted in payment. Petitioner stated on appeal (Reply Brief, p. 7):

> "Defendant-Appellant takes no issue with the jury's verdict on this appeal."

The case was argued in the Court of Appeals on facts predicated on the assumption that the notes were taken in payment and constituted more than an acknowledgement, and a promise to pay, the amount legally due. Petitioner's arguments in the Court of Appeals and in the petition were settled by the verdict of the jury.

The only issue left is whether, pursuant to Kentucky Statute law, the petitioner should be assessed ten (10%) per cent damages, plus double costs, in the event its petition is denied.

The respondent contends that since this action was removed to the District Court to obtain for the petitioner equal protection of the laws of the State of Kentucky, that under the relevant sections of the

United States Code, the petitioner should be required to pay the same damages that would have been imposed upon a domestic corporation on an appeal affirmed by the Kentucky Court of Appeals. If the law of the state is not applied in such event, a non-resident has a potential ten (10%) per cent advantage on appeal of the amount of the claim over a domestic corporation. (Kentucky Revised Statutes 21.130, p. 15.)

IN THE

Supreme Court of the United States

October Term, 1962

No. 910

AMERICAN STATES INSURANCE COMPANY, - *Petitioner,*

v.

CRANE SUPPLY COMPANY, a Division of Crane Company, - - - *Respondent.*

BRIEF FOR RESPONDENT.

THE PETITION DOES NOT PRESENT ANY QUESTION SUBJECT TO REVIEW.

The petitioner presents four questions for review. They will be discussed in petitioner's numerical order.

1. There was diversity of citizenship. The law as declared in Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 is applicable if (1) the question is important, and the decision of the Court of Appeals is clearly in conflict with decisions of the Kentucky Court of Appeals. Rule 19 (1) (b).

In United States v. Gerlach Live Stock, 339 U. S. 725, at page 735, 94 L. Ed. 1231, at page 1251, 70 S. Ct. 955, a writ was refused to review a claimed misconstruction of a deed reservation depending on local law.

This Court stated:

> "In any event, it presents a question of conveyancing and real property law peculiar to this one case, and depending on local law. It is not a question of general interest, nor is there any manifest error, and we accept, without review, the finding of the Court of Claims thereon."

In Spiegels Estate v. Commissioner, 335 U. S. 701, at page 708, 93 L. Ed. 330, at page 338, 69 S. Ct. 377, the Court stated:

> "It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy, and leave undisturbed this Court of Appeals holding on a question of state law."

See: Frances v. Southern P. Co., 333 U. S. 445, 92 L. Ed. 798, 68 S. Ct. 611; Propper v. Clark, 337 U. S. 472, 93 L. Ed. 1480, 69 S. Ct. 1333; Ragan v. Merchants Transfer & Warehouse Co., 337 U. S. 530, 93 L. Ed. 1520, 69 S. Ct. 1233.

The petitioner relied on the same seven Kentucky decisions in the Court of Appeals as here. See "Index of Authorities" brief on appeal, and "Citations" petition. The respondent in its brief on appeal relied on seven Kentucky decisions.

The questions presented by petitioner are of no interest generally. The decisions of the District Court

and the Court of Appeals were made on very singular facts, arising out of a bonding company's attempt to escape liability, as surety, by entrapment of its insolvent principal's bonded creditors.

Petitioner concedes (Brief, p. 13) that the case "was argued on the basis of Kentucky law." Petitioner now requests this Court to review the case on the presumption that the Court of Appeals ignored the cases argued on appeal.

2. The jury verdict was that the notes were not given in payment. Petitioner now contends that the notes were contracts to extend time for payment because past due interest was included in the principal of the notes. The interest included in the notes was legally due under Kentucky decisions.

3. There was no substantive proof that the building contractor was solvent on October 11, 1950. The surety, with knowledge of the contractor's inability to pay his accounts, conspired with the contractor to give notes to his suppliers with the intent to avoid liability on the bonds. The scheme failed because respondent refused to accept notes extending the time for payment.

4. The jury found that respondent did not grant to the contractor an enforceable extension of time to pay his accounts. No effort was made to prove the surety was prejudiced. The evidence was that the surety was not prejudiced; that it benefited by the two payments totaling $10,050.00 that were made within less than thirty days of the contractor's agreement

to make payments. The alleged issue of "no knowledge" was not plead in the District Court; was first asserted in the Court of Appeals, where it was shown to be false, by documents filed by respondent, which petitioner did not controvert (34b-45b).

STATEMENT OF THE CASE.

The issue made by the pleadings was whether the respondent had accepted notes from a contractor, tottering towards bankruptcy, in payment of his accounts, including the two accounts bonded by the petitioner, and, if the notes were taken in payment, whether acceptance of the notes prejudiced the petitioner in its subrogation rights.

The respondent offered the only competent and relevant tesitmony on the issue of acceptance of the notes in payment. That uncontradicted testimony was that the notes were taken as evidence of the amount due, and to fix dates on which payments had to be made under penalty of placing the contractor on a cash basis (72a-84a). The petitioner did not call either the contractor, or its agent, as a witness, to rebut respondent's evidence. The Trial Court overruled respondent's motion for a peremptory instruction, and over the objections of respondent, and without objection from the petitioner, submitted the action on an interrogatory, to which the jury answered that the notes were not accepted in payment (36a). Petitioner offered no testimony to support its claim that it had been prejudiced by the delivery of the notes.

The testimony introduced by respondent was that on the dates of the notes, and of the trial, there was due the contractor, Sanders, by the School Board $3,374.28 and $5,638.03 on the two bonded accounts (41b).

Petitioner had first subrogation rights to those balances, upon payment of respondent's claims.

On appeal petitioner injected a new contention that it had "no knowledge" of the delivery of the notes.

Respondent thereupon moved to dismiss the appeal, supported by sworn excerpts from a deposition, of the contractor taken in another action, wherein Sanders testified that the petitioner's agent knew of, and encouraged him with promises of signing new bonds, to give notes to his creditors, including Crane (43b); that because of respondent's refusal "to go along" he decided to "take Chapter 11" (44b).

The case of The Merrick Company, Inc., v. American States Insurance Company, Jefferson Circuit Court, Kentucky, was decided August 18, 1961, against the petitioner on the "no knowledge" issue. No appeal was taken from the judgment, which is copied herein (34b-37b).

The Kentucky decisions relied upon in the pending petition are analyzed in the *Merrick* judgment.

Under Kentucky law a promissory note, not negotiated, is a mere promise to pay. K.R.S. 413.120. Williamson v. Payne, 300 Ky. 161, 188 S. W. 2d 96.

COUNTER STATEMENT OF FACTS.

The record does not support petitioner's "Statement of the Case". Inferences are stated as facts.

The basic agreement was that Sanders would pay all accounts within ninety days, that any money received from bonded accounts would be applied to those accounts (73a). The testimony is not fairly susceptible to any other interpretation.

The case was, in fact, submitted to the jury on inferences drawn by the petitioner on which it now again relies. The verdict was, that they were not true.

The judgment of the Court of Appeals adopts the facts, and the verdict of the jury on the petitioner's inferences.

Petitioner states (11) that "the first statement Sanders received after the dates of the notes was a credit memorandum for $17.13. Attached to the credit memorandum on Sanders' open account were the two statements of the bonded accounts each of the three dated and mailed November 30, 1960. (14b-21b).

THERE IS NO REASON FOR GRANTING A WRIT.

The opinion is basic. Petitioner offered no evidence that it was prejudiced by the accelerated payments, induced by the pressure respondent put on the contractor to pay.

Under Kentucky law, the surety is liable for interest from the date the account should have been paid by the contractor.

The several liability of the defendant on its bond is stated in National Surety Corporation v. Daviess County Planing Mill, 281 S. W. 791, 213 Ky. 670. The Court held that a surety on a payment bond is liable for interest from the date the contractor should have paid the account. The liability for payment rested jointly and severally on Sanders and the defendant. The Court stated:

> "It is also complained that the Court erred in entering a judgment on the debt, with interest from February 7, 1924, and not from the filing of the petition on May 24, 1924. But the subcontractor was entitled to his money from the contractor on February 7th. The bond bound the surety for the payment of the money. In such a case, if interest is not allowed, the creditor will lose a part of his debt. It is a suit upon a written contract to pay, and interest may be allowed from the time the money was due and not paid. Henderson Cotton Mfg. Co. v. Lowell Machine Shops, 86 Ky. 668, 7 S. W. 142, 9 Ky. Law Rep. 831; City of Louisville v. Henderson, 13 S. W. 111, 11 Ky. Law Rep. 796; Citizens' Trust Co. v. Peebles, 174 Ky. 349, 192 S. W. 508.; Whitehead v. Brothers Lodge, 71 S. W. 933, 24 Ky. Law Rep. 1633."

The interest due from September 1, 1960 to October 11, 1960 on $29,918.80 amounted to either $273.88 if computed to October 10th, or $276.52 if computed to October 11th. Sanders' notes totalled $30,192.68, or $29,918.80 plus $273.88. The notes provided for interest at maturity dates. Had future interest been included in the notes, it would have amounted to $468.85,

not $273.88 as petitioner asserts. Sanders' bookkeeper made up the notes and made his computations on October 31, 1960. (Defendant's Exhibit 4, 101A). The notes are dated October 11, 1960.

KENTUCKY DECISIONS DO NOT SUSTAIN PETITIONER.

Petitioner quotes (p. 17) from 1. Williston Contracts, Section 122: The same text, Paragraph 120, at page 505, states:

> "Thus a promise of temporary forbearance in consideration of part payment of a debt is invalid, as is also a creditor's promise to accept payments in installments or to extend payment for a period * * *. Since the actual payment of a debt or the performance or partial performance of any existing obligation is insufficient consideration, a promise to pay a debt or to perform such a previous obligation in whole or in part is equally insufficient."

The part of the opinion in Robinson v. Miller quoted by defendant (p. 18) is a quotation from an Ohio decision.

The Kentucky Court of Appeals in Tudor, et al., v. Security Trust Co., 163 Ky. 514, 173 S. W. 1118, (p. 1119) stated:

> "(2-3) It is further urged for the appellants that the lower court erred in sustaining a demurrer to their pleading wherein there was asserted a parol contract between the administrator and the

Security Trust Company by which the latter agreed, in consideration of the payment of the interest up to March 11, 1914, not to enforce the collection of the note until October, 1914. The pleading of appellants does not allege when the interest, which was paid up to the 11th of March, 1914 was paid, or that any part of the interest so paid was paid in advance, and, construing its pleading most strongly against it, it must be assumed that the payment of the interest, so alleged to have been paid, was not made until on or after the 11th day of March, 1914, and at that date it had already accrued. Even if the trust company made the agreement asserted, there was no consideration for it, unless the interest, so paid was paid in advance. Where a party is already bound to do a thing, either by a general law or by an existing contract, an agreement to extend favors or grant an extension of time to him in consideration of his doing that which it is already his duty to do furnishes no consideration for the agreement or promise. He has undertaken no new obligation, but has only agreed to do that which he had previously bound himself to do."

In Spencer v. Louisville Banking Co., 4 K.L.R. 997, the Court stated:

"Filed May 8, 1883. Appeal from Louisville Chancery Court. Opinion of the court by Judge Reid, affirming.

"1. The giving of a note for an antecedent debt does not absolutely pay the debt unless it is given and received as payment. In the absence of any agreement, it operates as collateral security or as an extension of credit, and if the note is not

paid at maturity the right to sue on the original debt and enforce its security revives. Even where the old note is surrendered, the inference of payment may be rebutted by countervailing proof.

"2. H. executed his note to W. as trustee for the purchase money of a lot of ground sold to him by W. as trustee. W. indorsed the notes as trustee and sold them, and H. being unable to pay them when they fell due, it was agreed that W. should should take the personal notes of H., payable to his, W.'s personal order, discount the same and apply the proceeds to taking up the lien notes, all of which was done accordingly. H., after several renewals, failing to provide for the payment or further renewal of the personal notes, W., who had retained possession of the lien notes, delivered them to the bank to which he had discounted the personal notes. In an action by the bank for judgment upon the lien notes and an enforcement of the lien, the appellants, to whom H. had executed a mortgage upon the property, pleaded payment. HELD—That the personal notes were not received as payment of the lien notes, and that upon H.'s failure to pay the personal notes, W.'s right or that of his assignees, to sue on the original notes and to enforce his lien secured by them, revived."

In Crenshaw v. Duff's Ex'or., 103 S. W. 287, 31 K.L.R. 773, the Court held that a note given as evidence of a judgment debt was not payment. The Court stated:

"Appellee contends that appellant ought not to be allowed to recover for several reasons. He claims that his testator sued appellant and his

brother on the $1,145 note in the year 1879, and recovered a judgment against them for the balance of the note then due, counting interest at 10 per cent; that the renewal note, executed in January 1880, was a settlement of that judgment, and therefore appellant is barred from recovering the usury; and, further, that in that action it was adjudged that the 10 per cent interest recited in the note of $1,145.73 was a part of the consideration for the purchase of the land. Appellee filed with his answer a copy of the proceedings in that action, and upon an examination of that record we find that appellee is in error. It was not alleged in that action that the 10 per cent interest was a part of the consideration for the purchase of the land, and there was not an intimation that there had been fraud or mistake in the drafting of that note. The note recited that it was to bear 10 per cent interest after maturity, and that it matured about 12 months after its date, showing plainly that the interest to be paid was for forbearance only. The execution of the renewal note in January, 1880, was not a payment of the judgment. The taking of the note was only another evidence of the debt or claim. See Humphill's Adm'r. v. Millmore, 1 Ky. Law Rep. 351, and Owsley v. Boles' Adm'r., 90 S. W. 1157, 30 Ky. Law Rep. 1016."

Petitioner states (Petition, p. 22) the Court of Appeals failed to follow the Kentucky rule on subrogation rights of a surety. The question was not before the Court because petitioner has not paid respondent's claim.

Petitioner states (page 23):

> "In addition, the money that was collected from Sanders after these notes were executed was applied to the unbonded accounts rather than to the bonded accounts pursuant to the agreement."

Corman and Sanders agreed to apply money received from any bonded account to that account (70a to 84a). There were several bonded accounts. No money was paid Sanders on the two bonded accounts after the date of the agreement (10b-11b); $1,500.00 was applied to Sanders' two bonded accounts, in issue, on November 9, 1960 from money received by Sanders from sources other than the two bonded accounts (4b).

Petitioner not only is in factual error; its statement is an admission that the notes were only an incidental part of Sanders' promise to promptly pay his accounts; that they were not intended as more than written promises to do what, in law, he was then obligated to do. Petitioner abandoned its appeal theory.

THERE IS NO QUESTION FOR REVIEW.

The only question that was subject to review, was whether petitioner's motion for a judgment notwithstanding the verdict should have been sustained. The petitioner did not present that Question as being Involved.

The appeal did not present any questions of trial rulings.

Petitioner made a motion for a directed verdict at the conclusion of all the evidence, which was overruled. It filed a motion for judgment N.O.V., stating its grounds (40a):

> "The evidence *conclusively* established that on October 11, 1960, the plaintiff Crane Company, entered into a transaction with the defendant's principal, Roy B. Sanders, whereby Sanders was granted an enforceable extension of time to pay his then due indebtedness (which included the amount sued for in this action); that the extension of time was prejudicial to the defendant, and therefore, the defendant was released on the obligation of the bonds sued on, as a matter of law."

The Trial Court overruled the motion.

The Kentucky rule was stated in Troutman v. Mutual Life Insurance Company of New York, 125 F. 2d 769 (C.C.A. 6). After reviewing the old scintilla rule, abolished on January 12 1940, in Nugent v. Nugent's Ex'r., 284 Ky. 263, 135 S. W. 2d 877, the Court stated:

> "* * * The rule of practice to replace the scintilla rule was declared for future guidance as follows: 'When the evidence given at the trial, with all inferences that the jury could justifiably draw from it is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but should direct a verdict for the defendant.' 284 Ky. 275, 135 S. W. 2d 883."

* * * * * * *

"From the foregoing review of the Kentucky decisions, it is apparent that Kentucky law, pointing to the propriety of a directed verdict in the instant case, conforms to the settled rule of this circuit. Our court has repeatedly held that to submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and evidence which presents no more than such choice is not substantial." Cases cited.

DAMAGES AND DOUBLE COSTS SHOULD BE AWARDED RESPONDENT.

This action was removed from the State Court on the grounds of Diversity of Citizenship.

The petitioner elected to do business in the State of Kentucky on an equally competitive basis with domestic corporations, subject equally to the laws of Kentucky.

The petitioner is before this Court under the equal protection (and applicability) of the laws of Kentucky, 28 U.S.C.A. 1254; Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, (Petition, page 2).

Petitioner's position is that the laws of Kentucky are exclusively applicable to the adjudication of the rights of the parties.

Kentucky Revised Statutes 21.130 provides:

"Damages upon affirmance. Upon the affirmance of an appeal, or the dismissal of an appeal after it has been docketed in the Court of Appeals, where the appeal is from a judgment for the payment of money, the collection of which, in

whole or in part, has been superseded, as provided in the Rules of Civil Procedure, ten per cent damages on the amount superseded shall be awarded against the appellant. (1952, c. 84, Section 35)

28 U.S.C.A. 1652 provides:

"State laws as rules of decision. The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (June 25, 1948, ch. 646, 62 Stat. 944.)

28 U.S.C.A. 1912 provides:

"Where a judgment is affirmed by the Supreme Court or a Court of Appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double cost."

Supreme Court Rule 56 (4), provides:

"Where a petition for a writ of certiorari has been filed, and there appears to be no ground for granting such a writ, the court may, in appropriate cases, adjudge to the respondent reasonable damages for his delay."

The bonds signed by petitioner were required to protect suppliers on public projects, against which liens could not be filed. Domestic bonding companies, by appealing trial-court judgments, face a penalty of 10% upon affirmance of the judgment. Non-resident companies should be subject to an equal penalty.

Respondent has been delayed unreasonably since May 17, 1961 (39A) in the collection of its claim.

The petitioner plead two justiciable defenses:

(1) Denial that the materials supplied by respondent were used on the bonded accounts. This was a false issue, and no affirmative effort was made to sustain it.

(2) That because of the note transactions between the contractor and respondent the petitioner was deprived of its right to be subrogated to funds, if any, due the contractor on the public construction accounts. The proof was there was no change in the availability of the reserves payable the contractor. Petitioner made no affirmative effort to prove its claim of prejudice.

On appeal a new issue of "no knowledge" of the note scheme was presented and shown by the respondent to be false, and of no legal significance.

To further delay collection of the judgment, the pending writ was filed, in which petitioner has failed to show any reason why the petition should be granted.

The respondent has been damaged by expenses and attorneys' fees far in excess of double costs and 10% of the amount involved.

CONCLUSION.

For the reasons stated, respondent believes the Petition should be denied and damages awarded for delay.

Respectfully submitted,

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March 18, 1963.